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IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2024

Before:

MRS JUSTICE GWYNNETH KNOWLES

- -

Between:

A Local Authority	**Applicant**
- and -	
A Mother	**Respondent**
and	
A Father	
And	
Others	

- -

Re A and Others (Care Proceedings: Inherent Jurisdiction: Order for Return to Austria)

- -

Mr Edward Devereux KC (instructed by **Invicta Law**) for the local authority
Mr Michael Gration KC and Miss Mai-Ling Savage (instructed by **Osbornes Law**) for the mother
Miss Amanda Weston KC and Ms Rebekah Wilson (instructed by **Goodman Ray**) for the father
Mr Christopher Hames KC and Mr Harry Langford (instructed by **Freemans Solicitors**) for the paternal grandmother
Miss Gemma Farrington KC and Miss Vanessa Wells (instructed by **DSD Solicitors**) for the children by their children's guardian
Mr Mark Smith (instructed by the **Government Legal Department**) for the Secretary of State for the Home Department

Hearing date: 27 June 2024

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Approved Judgment

This judgment was handed down on 18 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Gwynneth Knowles:

Introduction

1. On 23 May 2024, I handed down a judgment determining that four boys were habitually resident in this jurisdiction (A Local Authority v A Mother and Others [2024] EWFC 110 (Fam)). Those children are the subjects of care proceedings in which the local authority seeks a determination that the children should be returned as soon as possible to Austria, the country in which all of them lived until May 2023 and in which one of them was born. This judgment concerns itself with that issue. My earlier judgment should be read alongside this decision. It provides background essential to an understanding of the children's circumstances.

2. The children are: A, aged 13; B, aged 11; C, aged 9; and D, aged 7. Following my earlier decision, the father told the children's guardian that the birth dates of A and B were incorrect so I have used the corrected dates to establish their ages. All four children are the subjects of interim care orders. The parties to the proceedings are the children's mother ("the mother"); the children's father ("the father"); and the paternal grandmother ("the grandmother"). The mother is of Syrian origin and lives in Vienna, Austria. The father was born in Syria and is presently living in temporary accommodation following his release from immigration detention. The grandmother lives in Vienna with her husband. None of the adult parties to the proceedings speaks English. The children are parties to the proceedings through their children's guardian.

3. At my invitation, the Secretary of State for the Home Department ("the Secretary of State") was represented by counsel and participated in the hearing. I am very grateful for his assistance in liaising with the Austrian authorities to clarify the status of the children and their father in that jurisdiction.

4. In coming to my decision, I have read the material in the court bundle as well as the skeleton arguments on behalf of the parties and the Secretary of State. I also had the benefit of oral submissions from counsel. I have been greatly assisted by the advocates in a case which has, if anything, become more complex since my previous judgment was handed down.

The Hearing

5. This matter was originally listed for determination on 17 and 18 June 2024. For reasons which I will explain, it was not possible to resolve matters on those dates. Given the pressing need for a decision on a possible return to Austria recognised by all the parties, I was able to reorganise my diary and return to London from my time on circuit in order to hear this case.

6. My order dated 23 May 2024 directed the local authority to file evidence by 5 June 2024 about its application to return the children to Austria together with a plan for any sibling assessment and a plan for any assessment of the father. The father and the paternal grandmother were directed to file their evidence in reply by 10 and 12 June 2024 respectively. Regrettably, the local authority's evidence was significantly delayed because the social worker was required to prioritise the children's placement and wellbeing following the breakdown of their foster home on 29 May 2024. The knock-on effect was to delay the filing of the father's and paternal grandmother's

evidence and inhibit the taking of instructions from the father by his legal representatives. On 12 June 2024, the father's legal representatives indicated their intention to apply for an adjournment of the hearing and did so the following day. When the matter came before me on 17 June 2024, the local authority apologised for its failure to comply with the court's directions and pointed to the significant amount of work done by the social worker in response to what was an emergency in the children's lives. It was obvious to me that those representing the father had struggled to obtain his clear instructions given the language barrier and were at a significant disadvantage as he had not filed the statement required of him by my earlier directions. As I was able to accommodate another hearing the following week, the balance fell firmly in favour of an adjournment on fairness grounds given the likely significant consequences of my decision for both the children, their parents and the paternal grandmother.

7. On 17 June 2024, the parties were in agreement that I would not be required to hear oral evidence from any party other than, possibly, the Austrian social worker. In the event, she was not required to give any evidence at the adjourned hearing.

8. On behalf of the father and supported by the paternal grandmother, Miss Weston KC applied for the instruction of an expert psychologist to assess whether the father required participation directions and, if so, what these might be. An expert had been identified who could report within a relatively short timeframe and there was a draft letter of instruction. It was submitted that the father required such an assessment by reason of being a war-traumatised person who might have difficulty participating in the hearing. This application was opposed by the local authority and the children's guardian, the mother taking a neutral stance. In a short judgment delivered in court on 17 June 2024, I refused the father's application as being unnecessary for me to justly resolve the proceedings. There was no evidence that the father was vulnerable such that his participation in the proceedings was likely to be diminished by that reason. At the hearing on 27 June 2024 and in order to address any perceived anxiety on the part of the father's legal team about his participation, I ensured that there were breaks in the proceedings so that the father was able to absorb the submissions with the assistance of his interpreter and legal team. Such breaks are, of course, one form of participation direction which the court can deploy to assist lay parties to understand and participate in a hearing. Vulnerability is not necessarily a pre-condition for the management of the court's business in this way.

9. At the directions hearing on 23 May 2024, the Secretary of State informed the court that (a) the father's claim for asylum – and, by extension, that of the children - had not yet been allocated to the Home Office's Asylum Expedited Team; (b) prior to the claim being allocated to the Home Office's Asylum Expedited Team, the Secretary of State was required to communicate with and obtain a response from the Austrian authorities; (c) the Austrian authorities had not yet provided a response; and (d) the inadmissibility process with respect to the application for asylum ordinarily had a timeframe of some six months. I directed the Secretary of State to provide information about the date on which the inadmissibility process had commenced and if a response had been received from the Austrian authorities. By way of context and briefly, under sections 80B and 80C of the Nationality, Immigration and Asylum Act 2002, the Secretary of State may declare the asylum claim of a person who has a connection to a safe third state inadmissible and thus the claim would not need to be substantively

considered. By the hearing on 17 June 2024, the Secretary of State had confirmed that no steps had been taken as part of the inadmissibility process prior to the hearing on 23 May 2024 because there was uncertainty about whether the children were unaccompanied asylum seeking children. Fortunately, by the time of the hearing on 17 June 2024, the Secretary of State appreciated the relevance of the children's possible readmission into Austria as part of the court's welfare decision and he was *"making urgent enquiries"*. Following my decision to adjourn the hearing on 17 June 2024, I invited the Secretary of State to clarify with the Austrian authorities what the present immigration status of the children was in that jurisdiction and encouraged him urgently to liaise with the Austrian Migration Authorities.

10. By an email dated 26 June 2024, the Secretary of State was able to confirm the position of the Austrian Migration Authorities. I will detail this in my updated background below.

Updated Background

11. What follows is a summary of the updated factual background pertinent to the issue before the court. It focuses on the children's situation.

12. In my previous judgment, I outlined what appeared to be a relatively stable situation for the children in respect of their foster placement and their education. Regrettably, the children's situation has deteriorated in almost every respect and, in the view of the local authority, is extremely unstable.

13. On 29 May 2024, the children made allegations against their male foster carer and, accordingly, they were removed and placed in emergency foster placements. They alleged physical abuse and said that their male carer had shouted at them. They also said that they were frightened of him. A strategy discussion took place on 30 May 2024 at which it was agreed that a section 47 joint visit with the police would take place. The children were moved from the emergency placement to their previous respite carers on 31 May 2024. A and B were placed with separate carers and C and D were placed together (in all three foster placements were required). These placements could not be extended beyond 3 June 2024. On that date, the children were moved and A and B were placed separately and C and D were placed together. The police and the social work team undertook a joint visit with the children on 4 June 2024. The children made further allegations against their previous foster carers. On 7 June 2024, the children were reunited in yet another foster home. In the past few days, the foster carers have given notice in relation to B, asking for him to be moved. I understand that the three other children can remain with their present carers though the local authority is searching for yet another placement for all four children together as well as looking for a foster home which can accommodate B separately from his brothers.

14. Following the hearing on 17 June 2024, B and C have been excluded from school. C was excluded for five days and his behaviour was described by the school as being *"really poor"*. B was said by the school to have been persistently disruptive *"for the last two days"*. He was said to have affected the whole class and stopped learning. He was described as having no respect for adult authority and also punching another child. The school said that B had had many warnings but did not listen to them. B was excluded from school on 26 June 2024, his first day back following his previous exclusion. His behaviour was said to be unmanageable.

15. Since the father was released from prison, the children have enjoyed family time with him supervised by the local authority. He sees the children twice a week and brings food for the children as well as gifts. According to the children's guardian, the contact supervisors have noted that the children are beginning to look to see what their father has brought them as opposed to enjoying seeing him. The children's guardian reported that the father had promised the children that they would live with him soon and promised them expensive gifts such as designer clothing, iPads and the latest iPhones. In her analysis, the children's guardian noted that the children were very settled until their father was released from prison and, during family time, started to promise expensive gifts and that they would soon live with him. She noted that this might be coincidental but was a matter which required consideration. The father had apparently not heeded advice not to promise expensive gifts to the children: in contact on 12 June 2024, the father told A that he would buy him a £400 scooter even though he had been asked by the social worker not to do this. The children were described by the local authority as being *"incredibly unsettled"* by their father's promises which had not materialised. In his recent statement dated 21 June 2024, the father asserted that he intended to give A his own phone next week so that A could contact him.

16. All four children want to live with their father. C and D have said they would go back with him to Austria. Neither child wanted to live with their mother or paternal grandmother. C told the children's guardian that he has been told by his father not to speak with either his mother or grandmother as, if he does so, he will be sent back to Austria. B told the children's guardian that he wanted to live with his father, either in England or in Austria. He does not want to see his mother or his paternal grandmother. A wants to stay in England and was unsure if he would go back with his father to Austria even if his father went there. He did not want anything to do with his mother. Neither A nor B had any memories of their paternal aunt who lived in Newcastle. It is striking that the children want nothing to do with their mother, accusing her of hurting them. This is despite the efforts of the local authority to promote indirect video contact between the children and their mother. In her most recent statement, the mother asserted that the father telephoned her on 15 May 2024 and reportedly said *"there is a war between you and me"* which she took as a threat for opposing him in these proceedings.

17. The father put forward the name of his paternal uncle's daughter – his cousin - as a potential carer for the children ("the paternal aunt"). She has had very little contact with the two older children and has never met C and D. She lives with her family in the North East and several other family members live locally who may be able to support her with caring for the children. The paternal aunt has been the subject of a positive viability assessment by the local authority. Further assessment of her was warranted based on an analysis of the strengths and weaknesses of the potential placement. The assessing social worker also recommended that consideration be given to convening a Family Group Conference to explore the wider family's resources in this jurisdiction.

18. In the form of written responses dated 12 June 2024 to questions posed by the local authority, Children's Services in Vienna confirmed the following:

    a) if the children were to be returned to Austria, they would be placed in a crisis centre with weekly contact to their mother and the paternal grandmother.

Contact with their father *"would only be possible after discussions with the social worker and with supervision"*;

b) a crisis centre is a centre for children, administered by the city of Vienna. It is a residential group of up to 10 children who are looked after by staff. Crisis meetings are held once a week with the children, family members and the social worker where the aims, goals and concerns arising are discussed. Generally, children spend six weeks in a crisis centre;

c) an attempt would be made to place the children together in a crisis centre but that could not be guaranteed. If the children were not placed together, then contact between the siblings would be encouraged;

d) if the mother and the paternal grandmother did not agree to a placement of the children in a crisis centre, then an application would be made to court (within eight days of the placement). The court would then decide, having regard to the children's best interests, whether an order should be made in favour of the Vienna Children and Youth Welfare Service and whether the children should be placed in a crisis centre;

e) once in a crisis centre, there would be consideration as to what was best for the children;

f) there would be an assessment of the family in order to examine the possible reunification with them. The assessment would include weekly discussions, observations, discussions with the children, assessments of living in housing conditions, liaison with the school and psychological assessments;

g) the children would be covered by health insurance in Austria and would be placed into school, if possible their previous school;

h) there is a plan for the children to receive psychological counselling and their wishes and feelings will be taken into account in decision-making, as far as is possible.

19. The Viennese Children's Services acknowledged that a return to Austria meant a new change of environment for the children and a break in their current relationships. It was not possible to predict what (stressful) dynamics would arise within the family as a result of the children's return. With respect to the father, Children's Services stated that *"the father is not currently a trustworthy cooperation partner for the child and youth welfare services"*.

20. In compliance with Article 33 of the 1996 Hague Convention, the local authority had sent a detailed report about the children to the Central Authority in this jurisdiction for transmission to the Austrian Central Authority. It had yet to receive a response from the latter.

21. The Secretary of State confirmed that the position of the Austrian Migration Authorities was as follows: (a) the children have asylum status in Austria and will be readmitted if returned pursuant to a High Court return order; (b) Austrian social workers involved would be happy to assist with the reception of the children once

they arrived in Vienna; (c) the father has asylum status in Austria and, if he returns voluntarily, he will be readmitted there; (d) if the father is forcibly returned to Austria by the UK authorities, he will not be admitted as there is no bilateral admission agreement between the UK and Austria.

Positions of the Parties

22. What follows summarises the parties' positions on the welfare issue before the court.

23. The local authority submitted that the children should be returned to Austria without delay and adopted the welfare analysis of the children's guardian. The children's father had abducted them from the mother and paternal grandmother who had parental responsibility. In so doing, he caused the children significant and long-term harm. Further, he put the children at enormous risk with a perilous journey to this jurisdiction. Until his most recent statement, the father had indicated that he would not support contact between the children and their mother and Mr Devereux KC submitted that the father had made efforts to alienate the children from their mother. He lacked accommodation and resources here to care for the children and had a recent criminal record here and in Austria. Mr Devereux KC described the father as the chief architect of the position in which the children found themselves.

24. The Austrian authorities were best placed to assess the children (including any proposal by the father or the paternal aunt to care for the children) and were willing and ready to do so. Both the children and their father retained their asylum status in Austria and would be readmitted to that jurisdiction. The only route whereby the local authority could effect a speedy return was by seeking permission to invoke the inherent jurisdiction and then inviting the court to make an inherent jurisdiction return order. Given the court's previous determination, the local authority did not see the necessity to pursue any application in relation to the children's application for asylum in this jurisdiction. Mr Devereux KC noted that, if the children were returned to Austria, the Austrian courts would have jurisdiction under Article 11 of the 1996 Hague Convention to make appropriate decisions, if necessary, about the children. Once the children became habitually resident in Austria, substantive jurisdiction would be acquired by the Austrian courts pursuant to Article 5 of the 1996 Convention.

25. On behalf of the mother, Mr Gration KC submitted that the children should be returned to Austria. He pointed to the father's inappropriate behaviour in contact which mirrored his behaviour in 2023 following his release from prison in Austria. Then, he had allegedly told the children to behave badly at school with the result that B had lost his place at a school that was particularly suited to his needs. The mother asserted that the father had encouraged the children to make false allegations about her and may well have encouraged the children to make false allegations about their foster carers in the belief that, if they could not remain in foster care, the children would be placed with their father. At the very least, the promises the father made to the children about life with him had gravely unsettled them. The mother's relationship with the children had been severely compromised despite the best efforts of the local authority.

26. Mr Gration KC supported the making of an inherent jurisdiction order returning the children to Austria and suggested that, alongside that order, there might be merit in

making a request pursuant to Article 8 of the 1996 Convention that the courts in Austria assume jurisdiction for the children. However, it was not strictly necessary to do so as the children's presence in Austria would clothe the Austrian courts with the jurisdiction to make orders pursuant to both Article 11 and Article 12 of the 1996 Convention.

27. On behalf of the father, Miss Weston KC submitted that the children's welfare interests were met by this court retaining its jurisdiction to make decisions about their future and strongly opposed their return to Austria. Having determined that the children were habitually resident here, this court was best placed to investigate and consider all the options for the children's future care. A further move back to Austria was likely to retraumatise the children in circumstances where it was unclear that the father would be assessed as a carer by the Austrian authorities. The children's wishes and feelings had not been heard within these proceedings and, if they felt ignored, the children would be devastated and unable to accommodate themselves to court decisions which may be made either here or in Austria. Frankly, the children were afraid of a return to Austria and wanted to live with their father. The father's immigration position was that he was liable to deportation which did not amount to a decision that he must be deported. His asylum claim would be impacted by the Secretary of State's duty pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 to treat the best interests of affected children as a primary consideration before making any immigration decision. In practice, Miss Weston KC submitted that the Secretary of State would await the decision of the family court and take it into account before taking his own decision on the father's application for asylum.

28. Miss Weston KC relied on the legal analysis set out in the position statement on behalf of the paternal grandmother dated 26 June 2024. She pointed to the positive assessment of the paternal aunt and submitted that, if the children left, it would not be easy for them to be readmitted to live here with their extended family if this was eventually assessed to be best for the children by the Austrian authorities. Having been given ample opportunity to take her client's instructions on this point, Miss Weston KC confirmed that, if the children were ordered to return to Austria, the father would return there with them.

29. On behalf of the paternal grandmother, Mr Hames KC supported the father and submitted that the children should remain in this jurisdiction. Were the children returned to Austria, the paternal grandmother would not support the children's reception into a crisis centre and so the Viennese Child Welfare authority would have to make an urgent application to the family court for C and D (for whom the paternal grandmother had parental responsibility). She supported the children's placement with their father but was heartened by the positive viability assessment of the paternal aunt. This court was best placed to grapple with any welfare decision concerning the children.

30. Mr Hames KC submitted that the local authority could not demonstrate the significant harm test set out in section 100(4)(b) of the Children Act 1989 ("the 1989 Act") was satisfied so as to apply for an inherent jurisdiction return order. It could not be said that being in the interim care of the local authority was causing the children such significant harm that they had to be returned to Austria. If the court was not persuaded by that submission, Mr Hames KC submitted that the court should approach the

children's welfare by undertaking a composite best interests assessment, having regard to the factors in Article 8 of the 1996 Convention and the pertinent case law applicable to best interests decisions under the inherent jurisdiction. In that context, he suggested that the paternal grandmother's participation in any Austrian legal proceedings or child welfare assessment would be disadvantaged by her limited fluency in German and lack of access to legal representation. Given that the children were strongly opposed to a return, it was unclear how any return might be practically effected. However, if the court took a different view, the paternal grandmother would be willing to care for all four children.

31. On behalf of the children's guardian, Miss Farrington KC supported the children's return to Austria and adopted the legal route map suggested by the local authority. She rejected any suggestion that the gateway test set out in s.100(4)(b) was not met in circumstances where the children's situation had deteriorated since the children's guardian had filed her analysis. Likewise, Miss Farrington KC rejected any criticism about the way in which the children's wishes and feelings were being presented to the court. It was quite clear that the children wanted to be with their father but those wishes were not decisive within an overall welfare analysis. The Austrian legal and social welfare authorities were obviously best placed to make decisions about the children's welfare, having had extensive involvement with the family over the years and being now willing and able to make proper arrangements for the children's care on their return.

32. The Secretary of State did not make oral submissions to me at this hearing. I had the benefit of a position statement from him dated 10 June 2024 which agreed with the view I expressed in my earlier judgment that the operation of immigration and asylum law did not prevent this court from implementing a welfare decision returning the children to Austria before their application for asylum had been determined. If the court made a return order, the Secretary of State would consider the children's asylum applications to be either (i) explicitly withdrawn upon confirmation that they wished to withdraw their dependency on their father's claim; or (ii) implicitly withdrawn once the children had left the UK following implementation of any return order (because an asylum claim can only be made from within the UK).

The Legal Framework

A Return Order

33. Applying a welfare test, the courts in England and Wales have assessed foreign placement options for many years alongside the comparative mechanisms for securing the return of children to another jurisdiction. What follows is not an exhaustive guide to the options available where children are in the care of a local authority. It is, however, a framework pertinent to the circumstances of these children who, this court has found, are habitually resident in this jurisdiction. This court has substantive jurisdiction in relation to the children pursuant to Article 5 of the 1996 Hague Convention.

34. Paragraph 19 to Schedule 2 of the 1989 Act provides that *"a local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court"* (para. 19(1)). A local authority may, with the approval of every person who has parental responsibility for the child arrange for,

or assist in arranging for, any other child looked after by them to live outside England and Wales (para. 19(2)). By paragraph 19(3), the court may not give its approval under subparagraph (1) unless it is satisfied that:

> *(a) living outside England and Wales would be in the child's best interests;*
>
> *(b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;*
>
> *(c) the child has consented to living in that country; and*
>
> *(d) every person who has parental responsibility for the child has consented to his living in that country.*

However, where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard subparagraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, [special guardian], or other suitable person (para.19(4)).

35. In Re C (A Child) (Schedule 2, Paragraph 19 of the Children Act 1989) [2019] EWCA Civ 1714, Moylan LJ held that the phrase *"other suitable person"* could not include *'persons corporate'* or *'unincorporate'*, meaning that:

> *"…The result of this conclusion is that when a child does not consent, and regardless of whether they do or do not have sufficient understanding, the court is not permitted to approve their placement in Scotland other than with a natural person. The consequence is that a local authority cannot 'arrange for, or assist in arranging for any child in their care' who does not consent to live in a residential home in Scotland (or indeed anywhere else outside England and Wales)".* (para. 41)

36. Thus, the statutory mechanism contained within the 1989 Act is not available in the circumstances of this case because there is no immediate plan for the children to return to live with a family member. The plan is for a return to a crisis centre - clearly, a form of residential care - in Vienna. In these circumstances, the local authority must rely on the inherent jurisdiction, this being the historic safety net which can be used where the welfare of British children or those within the jurisdiction of England and Wales so requires. Paragraphs 65-79 of Re T (A Child) [2021] UKSC 35 provide an authoritative analysis of the ambit of the inherent jurisdiction following the passage of the 1989 Act. When considering the interaction between the powers of the local authority to provide care to children and the powers available to the court pursuant to the inherent jurisdiction, the Supreme Court stated that (para. 119):

> *"It must also be borne in mind that Parliament made it very clear that it was not intended that the inherent jurisdiction should be entirely unavailable to local authorities, and that it appreciated that there could be cases in which it would be necessary to have recourse to it because there was reason to believe that the child would otherwise be likely to suffer significant harm. This is evident from sections 100(3) to (5). Like the express prohibitions in sections 100(1) and (2), the more general conditions imposed by subsections (3) to (5) are shaped to confine the local authority to orders otherwise available to them, but building in a safety net where those other orders not achieve the required result in a risky situation."*

37. Thus, a local authority may have recourse to the inherent jurisdiction in limited circumstances and only where prior leave is obtained for any such application. S.100(3) provides that *"no application for any exercise of the court's inherent jurisdiction with respect to children may be made by local authority unless the local authority have obtained the leave of the court"*. The court may only grant leave if it is satisfied that (s.100(4)):

(a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

Subsection (5) *"applies to any order (a) made otherwise than in the exercise of the court's inherent jurisdiction; and (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, but leave is granted)"*.

38. If leave is granted to the local authority to make an application for the return of the children to Austria, the High Court's power to do so is well accepted and uncontroversial (see In re J (A Child) (Custody Rights: Jurisdiction) [2005] UKHL 40). The exercise of that power is governed by an analysis of the children's best interests as set out in Re NY [2019] UKSC 49. In paragraph 49 of Re NY, Lord Wilson stated that:

> *" The mother refers to seven specific aspects of a child's welfare, known as the welfare checklist, to which a court is required by section 1(3) of the 1989 Act to have particular regard. She points out, however, that, by subsections (3) and (4), the checklist expressly applies only to the making of certain orders under the 1989 Act, including a specific issue order, as is confirmed by the seventh specific aspect, namely the range of powers under that Act. The first six specified aspects of a child's welfare are therefore not expressly applicable to the making of an order under the inherent jurisdiction. But their utility in any analysis of a child's welfare has been recognised for nearly 30 years. In its determination of an application under the inherent jurisdiction governed by consideration of a child's welfare, the court is likely to find it appropriate to consider the first six aspects of welfare specified in section 1(3) (see In re S (A Child) (Abduction: Hearing the Child) [2014] EWCA Civ 1557, [2015] Fam 263 at para.22(iv), Ryder LJ); and, if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should conduct an enquiry into any or all of those aspects and, if so, how extensive that enquiry should be".*

39. In paragraphs 56-63 of Re NY, Lord Wilson set out a number of questions which should have been considered by the Court of Appeal on the facts of that case:

i) was the evidence sufficiently up-to-date;

ii) had the judge made, or could the Court of Appeal make, findings sufficient to justify the summary return order;

iii) should an enquiry be conducted into any or all of the aspects of welfare specified in section 1(3) of the 1989 Act and, if so, how extensive should that enquiry be;

iv) should, in the light of Practice Direction 12J, an enquiry be conducted into the allegations of domestic abuse raised by the mother;

v) was it appropriate without identification of any arrangements for the child in Israel, and in particular of where the child and the mother would live, to conclude that the child's welfare required her to return to Israel;

vi) should oral evidence have been given by the parties and, if so, on what aspects and to what extent; and

vii) should the court have considered whether a Cafcass officer should be directed to prepare a report and, if so, upon what aspects and to what extent.

All bar one of these essentially procedural considerations are relevant in the circumstances of this particular case.

Transfer of Jurisdiction: The 1996 Hague Convention

40. Article 8 of the 1996 Hague Convention on the Protection of Children permits a country with substantive jurisdiction to transfer it to another Contracting State. It provides as follows:

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- *request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or*

- *suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.*

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a) a State of which the child is a national,

b) a State in which property of the child is located,

c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Where the Contracting State with jurisdiction is better placed to assess the best interests of the child, or where the Contracting States are equally well placed to assess the best interests, the Article 8(1) test will not be made out and jurisdiction will remain with the Contracting State having jurisdiction (see the decision of MacDonald J in AM & Anor v KL & Anor [2023] EWFC 15 at paragraphs 24-26).

41. Thus, an Article 8 transfer is by way of exception to the general rule that the state in which the children are habitually resident is better placed to assess fully their situation and welfare needs when reaching decisions about the children's best interests. The court having jurisdiction should ask itself whether the transfer of the case to a court in another jurisdiction is such as to provide genuine and specific added value with respect to the decision to be taken in relation to the child (see paragraph 27 of AM & Anor v KL & Anor). In deciding whether to transfer jurisdiction, domestic case law and European case law makes clear that it is not appropriate to engage in comparison between the respective laws and legal systems of the two jurisdictions in question (see paragraph 28 of AM & Anor v KL & Anor).

42. In circumstances where no Article 8 request is made or where one has been made but not yet accepted, and the children return to Austria, the courts in Austria will have immediate jurisdiction in relation to urgent matters on the basis of the children's physical presence in Austria pursuant to Article 11 of the 1996 Convention. Article 11(1) provides that *"in all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection"*. Once the children become habitually resident in Austria, the authorities of that state will exercise substantive jurisdiction pursuant to Article 5.

43. A potential obstacle to the children's return to Austria is Article 33 of the 1996 Convention. This reads as follows:

(1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of a child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

(2) The decision on the placement or provision of care may be made in the requesting state only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

44. The Practical Handbook on the operation of the 1996 Hague Child Protection Convention notes the *"strict rules"* which must be complied with before a placement of a child in institutional care within another Contracting State can be put into effect. If these rules are not respected, the placement may not be recognised abroad under the

Convention (paragraph 13.33). If the procedure set out in Article 33 has not been followed, this means that the placement of the child in institutional care abroad may be refused recognition under the Convention (paragraph 13.35). The Convention does not give precise details as to how the procedure under Article 33 is to operate in practice and the Handbook suggests in paragraph 13.39 that it is for the Contracting States themselves to establish a procedure to implement the Article 33 procedure.

Immigration Issues

45. In my earlier judgment, I indicated a provisional view that the operation of immigration and asylum law did not prevent this court from implementing a welfare decision which might result in the return of these children to Austria before their application for asylum in this jurisdiction had been determined. In that context, the Secretary of State agreed with my reasoning on the following basis.

46. Since G v G [2021] UKSC 9, the legislative landscape had changed, not only due to the effect of the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 on the relevant provisions of the Procedures Directive which can be treated as having been repealed, but also in relation to section 77 of the Nationality, Immigration and Asylum Act 2002. Section 77 has since been amended by the Nationality and Borders Act 2022, in relation to claims made after 28 June 2022, to the effect that removal to a safe third country can occur, pending the determination of an individual's asylum claim. Arguably, Austria fell within the definition set out at s.77(2B). That section reads as follows:

"A State falls within this subsection if

a) it is a place where a person's life and liberty are not threatened by reason of the person's race, religion, nationality, membership of a particular social group or political opinion,

b) it is a place from which a person will not be removed elsewhere other than in accordance with the Refugee Convention,

c) it is a place –

(i) to which a person can be removed without their Convention rights under Article 3 (no torture or inhuman or degrading treatment or punishment) being contravened, and

(ii) from which a person will not be sent to another State in contravention of the persons Convention rights, and

d) the person is not a national or citizen of the State."

If the children's return to Austria was sanctioned by the court, this could take place prior to a decision on the asylum claim.

47. The Secretary of State drew attention to the potential inadmissibility of the asylum claims made by the father on behalf of the children. Under sections 80B and 80C of the Nationality, Immigration and Asylum Act 2002, the Secretary of State may declare the asylum claim of a person who has a connection to a safe third state

inadmissible and the claim would not need to be substantively considered. If this criterion were met, this would be likely to enable a removal of the children from the UK to Austria. The published inadmissibility policy states that unaccompanied asylum seeking children are not suitable for the inadmissibility process. In that regard, paragraph 352ZD of the Immigration Rules sets out a three-part test as follows:

a) whether the child is under 18 years of age when the asylum application is submitted;

b) whether the child is applying for asylum in their own right; and

c) whether the child is separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so.

All three criteria are required to be satisfied for the inadmissibility process not to apply.

Analysis

48. Anyone contemplating the circumstances in which the children presently find themselves would be struck by how precarious and unstable their present care arrangements are in comparison to those in place at the beginning of April 2024. Since 29 May 2024, the children have experienced four placement moves and there is now a realistic prospect that some or all the children will need to move placement yet again. Further, there is considerable uncertainty as to whether B and C can continue to attend their present school. Their behaviour appears to have deteriorated such that the school can no longer manage their disruptive behaviour. These circumstances highlight the need for this court to determine the local authority's application without delay and to identify a legal mechanism whereby its decision can be speedily implemented. These children cannot be left in prolonged uncertainty about whether they will remain in this jurisdiction or return to Austria.

49. As indicated earlier in this judgment, I am satisfied that I have no jurisdiction to place these children abroad pursuant to paragraph 19 of Schedule II of the 1989 Act. I am also in no position lawfully to identify a particular placement in Austria in which these children can be accommodated or make an order placing these children in institutional care in that jurisdiction. The information provided by the Viennese Children's Services indicated that placement in institutional care - a crisis centre - was the option which best met the children's needs, including the need for careful assessment of their circumstances. However, I do not know which crisis centre would be available or whether the children would be placed together. I note that the grandmother has indicated her opposition to the children's placement in a crisis centre and, were such opposition to be maintained if the children returned to Austria, Children's Services would be required to make an application to the Viennese Family Court in order to maintain any immediate crisis centre placement. In those circumstances, this court is neither seeking to identify a particular placement nor to order the children's placement abroad in institutional care, such that an order to that effect is capable of being recognised pursuant to Article 33 of the 1996 Convention. No party suggested otherwise or submitted that Article 33 applied to the children's situation.

50. As a preliminary observation, a transfer of jurisdiction pursuant to Article 8 of the 1996 Convention is freighted with delay. Either the authorities of both Contracting States *"may proceed to an exchange of views"* or this court may suspend consideration of the case and invite the parties to introduce an article 8 transfer request before an Austrian family court with the relevant jurisdiction to determine such a request. Both routes inevitably mean further delay for the children. Further and notwithstanding the willingness of Viennese Children's Services to receive and accommodate the children on their return to Austria, this court cannot assume that, following an Article 8 transfer request, the Austrian family court **will** accept jurisdiction. Article 8(4) leaves open the possibility that the Austrian family court may decline jurisdiction if it does not consider that this is in the children's best interests. Thus, an Article 8 transfer alone does not provide an obviously swift or certain route for resolution of the children's situation. I will consider Article 8 later this judgement.

51. In those circumstances, the local authority's application for permission to invoke the inherent jurisdiction and then to invite this court to make a return order if this is in the children's best interests appears to be the legal mechanism best suited to the children's urgent and deteriorating circumstances. At one point in her submissions, Miss Weston KC suggested that there was some doubt that Re T (A Child) (see above) was authority for the proposition that the inherent jurisdiction was available in the circumstances of this case because Re T (A Child) concerned the interaction between the inherent jurisdiction and s.25 of the 1989 Act relating to secure accommodation and the ability of a local authority to place a young person deprived of their liberty otherwise than in an registered children's home or accommodation approved for use as secure accommodation. In my view, that narrow interpretation of Re T (A Child) ignores the authoritative analysis contained therein which is plainly articulated in paragraph 119 (cited above).

52. However, the inherent jurisdiction is not available to the court if the hurdle set out in s.100(4) is not crossed. Both limbs must be satisfied. With respect to s.100(4)(a), no party sought to persuade me that the result which the local authority wished to achieve - namely an order for the children's swift return to Austria - could be achieved through the making of such an order (a) otherwise than in the exercise of the court's inherent jurisdiction or (b) for which the local authority was entitled to apply. However, the grandmother and the father sought to persuade me that the significant harm test contained in s.100(4)(b) was not made out on the basis that it could not be said that being in the interim care of the local authority was causing the children such significant harm that they had to be returned to Austria. That submission struck me as misconceived, for example because the children's situation had deteriorated from the relatively settled position seen in early April 2024. I have already outlined the precariousness of the children's placement and of the educational provision for B and C but, additionally, the children's relationship with both the mother and their grandmother had been severely compromised and their contact with the father appeared to unsettle them. All these factors in combination amounted to a reasonable cause to believe that, if the court's inherent jurisdiction were not exercised, the children were likely to suffer significant emotional harm. Further, the hurdle in s.100(4)(b) does not require the attribution of the likely significant harm to an individual such as a parent or to an institution such as a local authority. To suggest that, in these circumstances, a child's situation in the interim care of a local authority

were incapable of amounting to likely significant harm within the meaning of s.100(4)(b) was inconsistent with the Supreme Court's decision in Re T (A Child). In that case, the Supreme Court had no difficulty in authorising recourse to the inherent jurisdiction where a young person was already in the care of a local authority but where the child was likely to come to significant harm if the court did not act. Thus, I am satisfied that the local authority has crossed the hurdle in s.100(4) of the 1989 Act.

53. Before analysing the children's best interests in the manner mandated by Re NY, I have considered the procedural safeguards identified by Lord Wilson in paragraphs 56-63 of that decision (see above). Thus, the evidence before the court is sufficiently up-to-date and I am in a position to make findings capable of justifying an order for the children's summary return to Austria. Practice Direction 12J is not applicable and no party sought to persuade me that oral evidence was necessary. I also had the benefit of a recent analysis of the children's circumstances from a Cafcass children's guardian. Additionally, the local authority provided information from the Viennese Children's Services about the arrangements for the children's reception were I to order their return. Finally, there was evidence allowing me to conduct a meaningful enquiry into the first six aspects of the children's welfare specified in s.1(3) of the 1989 Act.

54. My analysis of the best interests of the children is shaped by careful attention to what their welfare requires rather than what is merely desirable. That approach incorporates consideration not only of the Re NY test but also whether, in an Article 8 context, there will be a genuine and added advantage to the children of a return to Austria. Mr Hames KC suggested that I undertake a composite best interests assessment within an Article 8 context. That struck me as a helpful submission in the particular circumstances of this case and my approach is consistent with what he suggested.

55. With respect to the children's wishes and feelings, it is undoubtedly correct that they wish to be with their father. A is perhaps the child who would prefer to stay in this jurisdiction whether or not his father remained here but the other children want to be with their father whether he remains in this jurisdiction or returns to Austria. I have taken into account the ages of the older children and note that, in the assessment of the children's guardian and her instructing solicitor, neither A nor B had the capacity to instruct their own legal representatives. The children's wishes and feelings cannot be decisive and require to be balanced against the other relevant welfare factors. I reject the submission made by Miss Weston KC that the court has not had an opportunity to hear the children's voices and that they fear a return to Austria. The analysis provided by the children's guardian set out over nearly five pages her interviews with each of the children. What shines through is their attachment to their father and desire to be with him. If the children expressed what could be described as fear, this was related to the prospect of living with either their mother or their grandmother. In that context, I note that C told the children's guardian that his father had told him that if he spoke to his mother or grandmother, he would be sent back to Austria. Given the professional concerns expressed about the father's behaviour in contact and what is reported of his behaviour and attitude towards the mother at the time he abducted the children, I have some reservations whether the children's views about their mother or grandmother are authentically their own.

56. The children's physical, educational and emotional needs are complex. In the recent past, they have experienced numerous changes of carer and they have been separated

from each other, both here and in Austria. It is also apparent that, with the exception of D, their engagement with education has been compromised by their emotional difficulties and changes in their care arrangements. Their emotional needs have also been compromised by separation from their father whilst he was in prison both here and in Austria. Likewise, their relationship with their mother has been impacted by prolonged separation and distance from her and by what they may have been told about her by their father. The grandmother is also a significant figure for C and D and, as with the mother, those children's relationships with her have been attenuated by separation, distance and, likely, the views of others.

57. It is obvious that the welfare authorities in Vienna have had extensive involvement with the family since the children were small. Their knowledge of the family's strengths and weaknesses is significant and they are ready to provide support and assistance for the children as well as to assess their family. Assessment will be grounded in the family's previous lengthy involvement with welfare services and thus will not start from scratch. Indeed previous assessments recognised the effect on the children of a wide range of factors including war trauma, previous physical injuries, problems with integration, developmental problems and problems with cognition. Finally and obviously, the children's needs have also been shaped by their traumatic experiences in Syria, a factor well-known to and understood by the welfare authorities in Vienna. Those authorities have already factored into their reception plan the provision of psychological counselling for the children. It seems to me that any forthcoming assessment of the children's needs will be both thorough and alive to the multi-factorial nature of these children's difficulties. Whilst I have no doubt that an assessment of a similar sort could be constructed in this jurisdiction, it will start from a less well-informed knowledge base and will be inevitably marked by significant delay whilst the authorities here come to grips with years' worth of records from Austria, all of which will require translation and time to assemble. Though I have no evidence about this, those assumptions about the delay in getting an assessment of the children's circumstances off the ground here appear to be entirely realistic.

58. The likely effect of any change in the children's circumstances will be very destabilising. The children will be upset by a return to Austria but their father has indicated he will return to that jurisdiction if they do. The maintenance of contact with him – even if subject to supervision and assessment by the Austrian welfare authorities – will likely assist the children in adjusting to their return. A return will mean yet another placement move but further interim moves are certain if the children were to remain here. With respect to the children's ability to adapt to any change, the children were fluent German speakers before their father removed them from Austria. The evidence is a little unclear about the extent to which the children retain their ability to speak German as this has not been properly assessed in circumstances where they might be reluctant to admit to capability in that language. I have taken into account the children's guardian's comment that the children did not recall their German but also noted that, despite any cognitive difficulties, the children quickly developed the capacity to make themselves understood in English here, a factor which bodes well for any return to Austria. However, whatever the state of their present capability, my assessment is that, after a little over 12 months' absence, the children are likely to recover their fluency in German fairly quickly once placed in a German-speaking environment. Further, I note that Viennese Children's Services intend to

provide psychological support to the children which should assist in managing any transition.

59. The children's age, sex and background have already been mentioned in this analysis. An aspect of their background which has not yet been mentioned is that there are orders made by the Austrian courts which have removed parental responsibility for all four children from their father. The mother has parental responsibility for A and B and the grandmother for C and D. In fact, the legal proceedings concerning A and B remain pending before the Austrian Family Court and will revive on the return of those children to Austria. Finally and importantly, I take into account that all the children have asylum status in Austria and will be readmitted by the Austrian authorities if this court orders their return. If the father returns voluntarily, he too will be readmitted to Austria and enjoy the benefit of asylum status in that jurisdiction.

60. Turning to the question of harm, I am satisfied that all four children have suffered significant emotional harm and were likely to suffer significant physical harm for which their father is responsible. The father's abduction of the children from Austria was flagrant and deliberate. These were vulnerable children as any perusal of their background in Austria demonstrates yet the father behaved as if they were pieces on a chessboard to be picked up and set down wherever suited his purposes. I am satisfied that the children were likely traumatised by (a) their peremptory removal from Austria; (b) the mode of travel to this jurisdiction involving the known life-threatening dangers of a small boat Channel crossing; (c) the father's arrest and imprisonment in this jurisdiction; (d) the children's separation from the mother and the grandmother; and (d) their placement in foster care. The father's disregard for the children's needs appears to have included instructing the children to refuse contact with their mother and to say bad things about her. I note that it is only in his most recent statement that, almost as an afterthought, he acknowledges any role for the mother in the children's lives. Though I take into account that the father challenges the local authority's account of his recent behaviour in contact, the criticisms made by the local authority have some echoes in the father's behaviour in spring 2023 when he was released from prison in Austria. Until that point, the older children were relatively settled but records from Viennese Children's Services indicated that the father appears to have undermined the educational and psychological support the children received, for example by telling B that he did not need to be in a remedial class and should go to a *"normal"* school (resulting in B rejecting his school entirely). Coincidentally with the father's release in 2023, A's behaviour in school also deteriorated and he hardly attended a therapy group for traumatised children. Now, against the advice of the local authority, the father's promises to the children during contact that they will return to his care in the near future appear, at the very least, to have gravely unsettled them.

61. Turning to the capabilities of the parents and the grandmother, the Austrian authorities are better placed to assess the mother and the grandmother by reason of location, language and previous involvement. Indeed, they undertook assessments following the father's imprisonment which resulted in C and D moving to live with their mother. Other than to acknowledge the concerns about the mother's vulnerability expressed in the documents received from the Austrian authorities, I am in no position to come to any concluded view about her capabilities and those of the grandmother.

62. With respect to the father, I have already touched on the harm he caused to these children by abducting them from Austria. His reasons for doing so – as expressed to the Secretary of State both in June 2023 and when he was in prison – amounted to no more than a belief that his children would be better educated in this jurisdiction than in Austria. No other complaint in support of a claim for asylum was made at either time. The father has, moreover, been untruthful in his application for asylum, for example by stating that the mother knew about and supported the plan to move the children and claiming that she had abandoned the children to go and live permanently in Dubai. He also lied in his asylum application about whether he had ever been convicted of any criminal offences. In these circumstances, I have approached the father's statement recently filed in these proceedings with considerable caution. He now seeks to persuade me that he removed the children because of his and their experiences of racism and discrimination in Austria and challenges his conviction for people trafficking in that jurisdiction. Those allegations of racism and discrimination were broadly outlined and I saw no details describing that the father and the children had directly experienced discrimination on the part of the authorities by reason of their status as Syrian asylum seekers. In this regard, I have adopted the approach used in 1980 Hague Convention cases where allegations are made about the behaviour of another parent or about circumstances in the country to which return is proposed, namely by taking such allegations at their highest and then coming to an overall decision on the merits of any return.

63. The father's status in this jurisdiction is uncertain and he is liable for deportation. He has no financial or housing resources in the short and medium term which would allow him to care for the children. Though I take into account what Miss Weston KC said in her position statement about the decision making process of the Secretary of State, there is little doubt that any final decision about the children's status and that of their father in this jurisdiction is some considerable distance away given the pressures on the asylum system outlined in the Secretary of State's position statement. The father has confirmed through his counsel that he will return with the children to Austria and thus will be available for interview and assessment by the Austrian authorities.

64. I have also had regard to the positive viability assessment of the paternal aunt. She is one member of the father's numerous extended family, some of whom live in this jurisdiction and some of whom live in Austria. It is but the first stage in what – given the complexities in this case – is likely to be an extended process of assessment. The children have no memory of her. Her circumstances and suitability to care for these needy children are better capable of being assessed by Viennese Children's Services for the reasons outlined elsewhere in my analysis. I observe that the paternal aunt is potentially not the only family candidate who may be able to provide the children with a home.

65. The proposals made by Viennese Children's Services are sufficiently detailed given the extensive knowledge about the children's and the family's circumstances held by those authorities. Proper arrangements can be made for an exchange of information between the local authority and Children's Services. It was suggested by the father that he would not be properly assessed by Children's Services but I reject that submission. The circumspection expressed by Children's Services about contact with the father is, given his abduction of the children, prudent and I do not interpret it as a

blanket refusal to assess what he has to offer the children. Such a stance would be inconsistent with the wide-ranging assessment of the children's needs which is planned were they to return to Austria. In any event, Children's Services have made explicit the need to take into account the children's wishes and feelings as part of any decision making process.

66. Standing back and with the above analysis firmly in mind and balancing all the relevant factors, I have decided that the welfare interests of these children are best met by a return to Austria. This decision also affirms that, having regard to Article 8 of the 1996 Convention, the Austrian authorities are better placed to assess the best interests of the children because they can provide genuine and specific added value to the important decisions which need to be taken about these children's future.

67. Having taken at their highest the father's allegations about circumstances in Austria, those allegations of racism and discrimination do not, in my view, constitute a barrier to the children's return. First, challenge by the father to any criminal conviction ought be pursued in Austria as this is the country under whose laws he was convicted. Second, the unspecific allegations of institutional racism and discrimination were, for practical purposes, diminished by the careful proposals for the children's reception and care by Viennese Children's Services and by the confirmation that the father's asylum status in Austria remained intact if he returned voluntarily. The safe status of the children in Austria has also been confirmed. Moreover, the father has access to the family court in Austria with respect to matters concerning the children and there is no reason to believe either he or indeed his mother would be disadvantaged in advocating for what they thought best for the children. Indeed, the grandmother has already been involved in legal proceedings concerning the children and was awarded the custody of C and D. Finally, the father's complaints of racism and discrimination on the part of individuals would be matters for the authorities in Austrian to address.

68. I make a declaration pursuant to the inherent jurisdiction that the children's welfare requires their return to Austria. My declaration requires the making of an inherent jurisdiction return order which should be implemented without delay so that the children can move and settle before the start of the autumn term in Vienna.

Implementation

69. My decision to return the children is not accompanied by an Article 8 request. I make it clear that, had I thought it necessary, I would have made an Article 8 request on the basis that the test for so doing was amply satisfied. In circumstances where there is no legal obstacle to the children's return and where it has been confirmed that the children will be permitted entry to Austria, it seems to me that an Article 8 transfer request made at the same time as an inherent jurisdiction return order may confuse in circumstances where the children are likely to have returned some time before the outcome of any such request would be known. Practically speaking, the Austrian authorities know about these proceedings having been consulted and informed throughout so the absence of any Article 8 request is not disrespectful given the children's deteriorating circumstances. Further, the Austrian authorities will be able to exercise jurisdiction in respect of matters of urgency, for example, to regulate the children's placement, from the minute they return. Thus, the Austrian social welfare authorities have indicated their consent to the children's return; the Austrian migration authorities have done likewise; and, in circumstances where the Austrian

family court will revive the legal proceedings relating to A and B on their return, I am confident that the judicial authorities will also assume jurisdiction for all four children.

70. Finally, during the course of submissions on 17 June 2024, the Secretary of State suggested that I may wish to consider making a declaration that the local authority was permitted, by the use of the powers invested in it pursuant to S.33 of the 1989 Act, to withdraw the children's claims for asylum if I ordered their return to Austria. During submissions, no party invited me to consider doing so or contended that the asylum claims amounted to a barrier to the implementation of any return order. Given my previous decision that the existence of asylum claims on behalf of these children was no barrier either to the making of or to the implementation of a return order, I saw no need to take that additional step where the Secretary of State had confirmed his agreement with the analysis set out in my earlier judgment.

71. The Secretary of State drew my attention to a number of other matters relating to the children's claims. I express no view on these matters for to do so would trespass on the Secretary of State's decision-making powers in relation to matters of immigration.

Conclusion

72. That is my decision.